

STATE OF MICHIGAN
COURT OF APPEALS

LOUIS GHAFARI,

Plaintiff-Appellant,

v

TURNER CONSTRUCTION COMPANY,

Defendant/Cross-Plaintiff/Third-
Party Plaintiff-Appellee,

and

HOYT, BRUM & LINK and GUIDELINE
MECHANICAL, INC.,

Defendants/Cross-Defendants,

and

ACCOUSTICAL CEILING & PARTITION,
COMPANY,

Defendant,

and

THE EDISON INSTITUTE a/k/a HENRY FORD
MUSEUM & GREENFIELD VILLAGE,

Defendant/Third-Party Plaintiff,

and

CONTI ELECTRIC, INC., and R.W. MEAD &
SONS, INC.,

Third-Party Defendants.

UNPUBLISHED

April 19, 2007

No. 271253

Wayne Circuit Court

LC No. 00-007319-NO

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendant's motion for reconsideration and granting defendant's motion for summary disposition.¹ We reverse.

I

This case is before this Court for the third time, having been decided by this Court in *Ghaffari v Turner Constr Co*, 259 Mich App 608; 676 NW2d 259 (2003) (*Ghaffari I*), then remanded to this Court by the Supreme Court following its decision in *Gharaffi v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005) (*Ghaffari II*), and thereafter remanded to the trial court by this Court, *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460; 708 NW2d 448 (2005) (*Ghaffari III*). The narrow question presented in this appeal is whether the trial court correctly ruled that the prior appellate decisions in this case precluded a finding on remand of defendant's liability under the common work area exception. We hold that the prior decisions did not preclude such a finding and, therefore, the trial court erred in granting summary disposition on that basis.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) to determine whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. *Ghaffari III*, *supra* at 463. We review for an abuse of discretion a trial court's decision to grant or deny a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

III

The pertinent substance of the prior appellate decisions in this case was set forth in *Ghaffari III* as follows:

This case is before us on remand from the Supreme Court. *Ghaffari v Turner Constr Co*, 473 Mich 16, 699 NW2d 687 (2005) (*Ghaffari II*). In our earlier opinion, *Ghaffari v Turner Constr Co*, 259 Mich App 608, 676 NW2d 259 (2003) (*Ghaffari I*), we unanimously affirmed the trial court's grant of summary disposition in favor of defendants Turner Construction Company (Turner); Hoyt, Brum & Link (Hoyt); and Guideline Mechanical, Inc. (Guideline), on three separate grounds. First, we found that neither the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*, nor the federal Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq.*, imposed a statutory duty in a negligence context on defendants. *Ghaffari I*, *supra* at 612-613. Second, we found that the pipes on the floor, over which plaintiff tripped, were an open and

¹ Because this appeal involves only defendant Turner Construction Company, this opinion will simply refer to Turner as "defendant."

obvious condition and we extended the open and obvious danger doctrine to claims of general-contractor liability to preclude plaintiff's suit. *Id.* at 614-615. Third, with respect to Turner, we noted that a general contractor is normally not liable for a subcontractor's negligence, and we found that none of the exceptions to the general rule of nonliability—retention of supervisory control, dangers occurring in common work areas, and inherently dangerous activities—applied in the instant case. *Id.* at 615-617.

The Supreme Court disagreed and reversed the decision of this Court, concluding that the open and obvious danger doctrine did not apply to a claim brought under the common work area doctrine. *Ghaffari II, supra* at 31. In doing so, the Supreme Court directed:

“On remand, the Court shall first consider whether a genuine issue of material fact exists regarding Guideline's ownership of the pipes. If it concludes that no such issue exists, then it shall affirm the trial court's grant of summary disposition for Guideline on that ground. Should the Court conclude that an issue of fact does exist, then the Court shall consider if Guideline, along with Hoyt, owed plaintiff any duty under *Fultz* [*v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004)].

“If the Court concludes that Hoyt, Guideline, or both owed plaintiff a duty under *Fultz*, the Court shall then remand to the trial court for further proceedings against the relevant subcontractor(s) and Turner. However, should the Court conclude that the subcontractor(s) owed plaintiff no contractual duty, then it shall dismiss Hoyt and Guideline from the suit and remand for further proceedings against Turner only. *Id.* at 30-31.” [*Ghaffari III, supra* at 461-463 (footnotes omitted).]

The *Ghaffari III* opinion concluded by stating: “Remanded to the trial court for further proceedings against Turner only. We do not retain jurisdiction.” *Id.* at 467.

IV

On remand to the trial court, defendant again moved for summary disposition. The trial court denied the motion following a hearing on February 28, 2006. Before entry of the order denying defendant's motion for summary disposition on April 17, 2006, defendant filed a motion for reconsideration.² The trial court dismissed the motion for reconsideration in a written order, stating:

Defendant, Turner Construction Co. filed this Motion for Reconsideration pursuant to MCR 2.119(F)(3), as a result of the Court denying Turner's Motion

² According to defendant, the motions were both sent on April 11, 2006; however, the court did not enter the order denying summary disposition until April 17, 2006, and thus, the motion for reconsideration preceded the entry of the order denying summary disposition.

for Summary Disposition pursuant to MCR 2.116(C)(10). MCR 2.119(F)(1) provides that a motion for rehearing or reconsideration must be served and filed not later than 14 days after entry of an order disposing of the motion. Turner's Motion for Reconsideration was served and filed on April 11, 2006. An order disposing of Turner's motion has been presented for entry on April 17, 2006. Accordingly, Turner's Motion for Reconsideration was not served and filed within 14 days after entry of the order disposing of the motion. THEREFORE, IT IS ORDERED that Turner's Motion is DISMISSED with prejudice pursuant to MCR 2.119(F)(1).

On April 20, 2006, defendant refiled its motion for reconsideration. On June 5, 2006, the trial court issued a written opinion and order granting defendant's motion for reconsideration and granting defendant's motion for summary disposition. The trial court concluded that this Court's determination in *Ghaffari I*—that the common work area exception to the general rule of contractor nonliability did not apply given the facts of this case—was binding precedent despite the Supreme Court's reversal on appeal. Accordingly, the trial court concluded that defendant was entitled to summary disposition.

V

On appeal, plaintiff argues that the trial court erred in concluding that defendant was entitled to summary disposition on the basis of this Court's prior decisions in this case. We agree.

Citing *Tebo v Havlik*, 418 Mich 350, 379; 343 NW2d 181 (1984), LEVIN, J., dissenting, for appellate precedent principles, the trial court reasoned that the prior appellate decisions in this case entitled defendant to summary disposition:

In *Tebo*[, *supra*,] the Court held that the decisions of the Court of Appeals are binding precedent which must be followed by the trial courts unless and until there is a conflicting decision of the Court of Appeals or a disapproving or overruling decision by this Court. In *Ghaffari I* the Court held that the pipes did not pose a high risk to a significant number of workers, and thus the common work area exception to the general rule of a contractor's non-liability did not apply did not apply. [sic] In *Ghaffari v. Turner Construction Co.*, 473 Mich. 16 (2005) ("*Ghaffari II*"), the Court held that the open and obvious doctrine did not apply in construction cases and remanded the case back to the Court of Appeals for a determination as to whether co-Defendants Guideline Mechanical & Hoyt, Brum, and Link should remain in the case. Accordingly, there has been no disapproving or overruling decision by the Michigan Supreme Court pursuant to *Tebo, supra*.

In *Ghaffari v. Turner Construction Co. [(On Remand)]*, 268 Mich. App. 460, 462 (2006) [sic] ("*Ghaffari III*"), the Court concluded that with respect to Turner, we noted that a general contractor is normally not liable for a sub-contractor's negligence, and we found that none of the exceptions to the general rule of non-liability—retention of supervisory control, dangers occurring in common work areas, and inherently dangerous activities—applied in the instant case.

Accordingly, there has been no conflicting decision by the Court of Appeals in this case. As a result, the holding of the Court in *Ghaffari I* and *Ghaffari II* [sic, *III* ?] is binding precedent that must be followed by this Court pursuant to *Tebo, supra*. Consequently, there is no genuine issue of material fact that Turner incurred liability based on the applicability of the three exceptions to the general rule that a general contractor is not liable for a sub-contractor's negligence or on the application of the open and obvious doctrine.

Although plaintiff argues several alternative grounds in challenging the trial court's decision, we find plaintiff's argument that this Court's decision in *Ghaffari I* was reversed by the Supreme Court, dispositive, and, therefore, we need not address plaintiff's remaining grounds for reversal. Contrary to the trial court's analysis, it is implicit in the Supreme Court's decision in *Ghaffari II* that the Supreme Court reversed this Court's alternative holding that defendant was entitled to summary disposition because none of the three exceptions to the common work area doctrine applied, *Ghaffari I, supra* at 617. To hold otherwise logically defies the Supreme Court's decision in *Ghaffari II*, which expressly directed this Court to remand this case for further proceedings against defendant, regardless whether this Court found on remand that the subcontractors were entitled to summary disposition. *Ghaffari II, supra* at 31. The Supreme Court certainly could have, but did not, accept this Court's alternative basis for affirming the grant of summary disposition to defendant. The Supreme Court's remand for further proceedings against defendant therefore implicitly reversed this Court's affirmance of summary disposition on the alternative basis that "the pipes on the floor [did not pose] a 'high risk to a significant number of workers.'" *Ghaffari I, supra* at 616. To hold otherwise creates an "irreconcilable conflict" with the Supreme Court's express directive to remand this case for further proceedings against defendant. See *Ghaffari II, supra* at 22.

Further, any reliance by the trial court on this Court's recitation, in *Ghaffari III*, of the earlier conclusions in *Ghaffari I* is misplaced. Although in *Ghaffari III*, this Court recited its previous holdings, the opinion thereafter noted the Supreme Court's disagreement with this Court's decision, and quoted in full the Supreme Court's specific directives on remand. These directives included an unconditional directive to remand this case for further proceedings against defendant:

"If the Court concludes that Hoyt, Guideline, or both owed plaintiff a duty under *Fultz*, the Court shall then remand to the trial court for further proceedings against the relevant subcontractor(s) and Turner. However, should the Court conclude that the subcontractor(s) owed plaintiff no contractual duty, then it shall dismiss Hoyt and Guideline from the suit and remand for further proceedings against Turner only. *Id.* at 30-31." [*Ghaffari III, supra* at 462-463 (footnote omitted).]

Defendant's argument, and the trial court's conclusion, that defendant was entitled to summary disposition on the basis of this Court's alternative holding in *Ghaffari I* is erroneous. Given the Supreme Court's remand directive, the law of the case doctrine does not entitle defendant to summary disposition. Under the law of the case doctrine, "as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Law of the case applies to issues actually decided, either implicitly or

explicitly, in the prior appeal. *Id.* Here, the Supreme Court implicitly decided that defendant was not entitled to summary disposition as set forth by this Court in *Ghaffari I*, and thus, defendant was not entitled to summary disposition on the basis of *Ghaffari I* on remand to the trial court.

Our conclusion in this case is consistent with decisions from our Supreme Court and this Court. In *Horace v City of Pontiac*, 456 Mich 744, 754-755; 575 NW2d 762 (1998), for example, the Court held that no rule of law remains from a decision of this Court once the Supreme Court reverses, even if that reversal does not touch every issue decided by the Court of Appeals. See, also, *Dunn v Detroit AIE*, 254 Mich App 256, 261-262; 657 NW2d 153 (2002). Thus, although our original decision in *Ghaffari I* did not contain a rule of law binding on the circuit court once it was reversed by the Supreme Court, the circuit court is free on remand to consider whether the common work place analysis provided by our Court in *Ghaffari I* was persuasive. *Horace, supra* at 755.

The trial court abused its discretion in granting defendant's motion for reconsideration on the basis of the prior appellate decisions in this case. "Where the trial court misapprehends the law to be applied, an abuse of discretion occurs," and reversal is warranted. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray